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STATE LANDS: WHAT ARE WE DOING?

THOMAS O. SMITH*

I. INTRODUCTION

North Dakota has arrived at the fork in the road of its destiny in dealing with its natural resources. Which road it will take has not been finally determined. Coal development, land use planning and water pollution are a few of the problems that our government officials, legislators and citizens face and must resolve for this state to arrive at its eventual destiny. Whatever decisions are made, the state, in its governmental capacity, will formulate answers to these problems. In arriving at such decisions, however, it must decide how to deal with a particular problem in its own house.

North Dakota still owns a relatively large number of surface acres. This article concerns itself with this proprietary interest, how these lands are presently administered, the problems of such administration and what course of action might be taken in the future.

When North Dakota was admitted to the Union, it was granted land out of the public domain¹ for the support and maintenance of the common schools,² buildings at the state capitol,³ and for various educational and charitable institutions.⁴ This grant provided specific sections in every township and also a method to select land out of the public domain. The land is commonly referred to as "original grant land"⁵ and amounted to a grant of 3,191,770.28 acres.⁶

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1. Enabling Act of 1889, ch. 180, 25 Stat. 767 [Hereinafter referred to as Enabling Act, §§ 1 through 25] (Reprinted Vol. 13 N.D. CENT. CODE).

2. *Id.* § 10, 25 Stat. 679.

3. *Id.* § 12, 25 Stat. 680.

4. *Id.* §§ 16, 17, 25 Stat. 681.

5. The definition of "original grant land" is contained in N.D. CENT. CODE § 15-06-01 (1971) which provides:

The term "original grant lands" shall mean all of the public lands which heretofore have been or hereafter may be granted to the state by the United States for the support and maintenance of the common schools or for the support and maintenance of the university, the school of mines, the state industrial school, the agricultural college, the school for the deaf, any normal school, or any other educational, penal, or charitable institution, and any lands which have been obtained by the state through a trade of any such lands for other lands. Original grant lands which have been sold on contract shall retain their character as such grant lands until the contract has been paid up and a patent issued therefore.

6. Records of the State Land Department.

In addition to this "original grant land,"⁷ North Dakota acquired over one and a half million acres,⁸ most of it through foreclosure of farm loans during the "thirties." This land is commonly referred to as "nongrant lands"⁹ or "acquired lands."

As of June 30, 1974, these holdings of surface acres have been reduced to 724,514.11¹⁰ acres of which 45,521.32 acres are "nongrant lands"¹¹ and 678,992.79 acres are "grant lands."¹²

For a breakdown of the total acreage figure by county, acreage and number of tracts see the Appendix.

A review of the Appendix indicates most of the remaining acreage lies in the western part of North Dakota and within those counties in which the "badlands" are located.

II. THEORY OF OWNERSHIP

A common misconception in regard to these lands granted to North Dakota by the United States is that the state is the fee owner. Such is not the case. These lands were not granted to North Dakota to do with as it saw fit. The grants were for specific purposes. Sections sixteen and thirty six in every township were granted for the support of the common schools.¹³ Ninety thousand acres were granted for the use and support of agricultural colleges.¹⁴ In addition, North Dakota was also granted the following:

For the school of mines, forty thousand acres; for the reform school, forty thousand acres; for the deaf and dumb asylum, forty thousand acres; for the agricultural college, forty thousand acres; for the university, forty thousand acres; for State normal schools, eighty thousand acres; for public buildings at the capital of said State, fifty thousand acres, and for such other educational and charitable purposes as the legislature of said State may determine, one hundred and seventy thousand acres; in all five hundred thousand acres.¹⁵

The courts have reviewed such grants by the United States and placed the ownership by the states in the proper prospective by con-

7. *Id.*

8. *Id.*

9. The definition of "nongrant lands" means all lands obtained by the Board of University and School Lands in any manner other than that described in Section 15-06-01. N.D. CENT. CODE § 15-07-01 (1971). Lands granted to North Dakota for buildings at the capitol under section 12 of the Enabling Act are considered "nongrant lands". See *Abbey v. State*, 202 N.W.2d 844, 853 (N.D. 1972). This article is not concerned with "nongrant lands" since none has been sold since May, 1963. The board passed a resolution to discontinue the sale of this land because only 50 per cent of the minerals could be reserved for sale. See *Minutes of the Board of University and School Lands*, Book J, at 103.

10. Records of the State Land Department.

11. N.D. CENT. CODE § 15-07-01 (1971).

12. N.D. CENT. CODE § 15-06-01 (1971).

13. Enabling Act of 1889, ch. 180, § 10, 25 Stat. 679.

14. *Id.*, § 16, 25 Stat. 681.

15. *Id.*, § 17, 25 Stat. 681.

sistently restating the proposition that such lands were received by the states and held by them in trust.¹⁶

Nebraska's most recent decision dealing with that state's title to such lands, *State v. Rosenberger*,¹⁷ sets forth the theory:

It is quite clear that title to the school lands of this State is held in trust for the benefit of the common schools and that the State is required to administer them as trust property, subject to the rules of law applicable to the handling of trust estates.¹⁸

North Dakota's Supreme Court has also had an opportunity to review the theory of this state's title under its Enabling Act grants.¹⁹ The court set forth its view of the matter as follows:

Pursuant to the terms of the grant from the United States and the acceptance of the lands subject to such terms, the State holds the title to the lands thus granted in trust.²⁰

Therefore, North Dakota does not have the ordinary incidents of a fee title to lands thus granted. It was vested with fee title subject to an express trust in favor of the beneficiaries designated in the grants.²¹

III. ADMINISTRATION

North Dakota accepted these grants of lands by the United States²² and established a procedure to deal with its responsibilities and duties as a trustee.²³ The North Dakota Constitution established a supervisory board entitled the "Board of University and School Lands" which consists of the superintendent of public instruction, governor, attorney general, secretary of state and state auditor.²⁴ The constitution grants the board general powers, providing that: ". . . subject to the provisions of this article and any law that may be passed by the legislative assembly, said board shall have control of the appraisement, sale, rental, and disposal of all school and university lands, . . ." ²⁵ These same board powers appear in statutory form.²⁶

In Fuller v. Board of University and School Lands of the State

16. 63 Am. Jur. 2d, *Public Lands* § 107, n.61 at 574; 73 C.J.S., *Public Lands* § 88.

17. 187 Neb. 726, 193 N.W.2d 769 (1972).

18. *Id.* at 733, 193 N.W.2d at 773.

19. *State Highway Comm'n v. State*, 70 N.D. 673, 297 N.W. 194 (1941).

20. *Id.* at 676, 297 N.W. at 195.

21. Enabling Act of 1889, ch. 180, §§ 10, 16, 17, 25 Stat. 679-81.

22. N.D. CONST. § 205.

23. N.D. CONST. art. IX.

24. N.D. CONST. § 156.

25. *Id.*

26. N.D. CENT. CODE § 16-01-02 (1971).

of *North Dakota*,²⁷ the Supreme Court of North Dakota considered the powers of the board and said:

The board, then as construed by legislative enactment on the matter of its powers, has full control of the selecting, appraisal, rental, sale, disposal, and management of school lands of the state. It acts as a body for and on behalf of the state. With this grant of general power is expressly and impliedly conferred the duty of using judgment and discretion in such matters, commensurate with the importance of the trust reposed in it. This is the plain intent of the Constitution and statute creating the board and defining its duties. It is then a board vested with discretion in the performance of its duties generally, except where it is by law specially limited therein.²⁸

This concept that the board is vested with broad powers and discretion in the performance of its duties has been adhered to down through the years.²⁹

IV. THE PROBLEM

Within the last ten years our society has placed a great emphasis on ecology, land use planning and a multiple use concept of land. The Board of University and School Lands has not been impervious to that trend.

During the 1971 Legislative Session, Senate Concurrent Resolution 4087³⁰ was passed by both houses of the legislature and urged state agencies which owned or controlled land "to give consideration to the scenic, recreational, and conservational value of state land in leasing policies and to withhold this land from sale."³¹ This concurrent resolution was apparently precipitated by a study and report³² made by the North Dakota Game and Fish Department.³³

Clearly stated in its introduction is the purpose of that report: "... to inventory State University and School Lands in 1970 to determine their environmental, esthetic, recreational, conservation, ecological and wildlife values."³⁴ That study reviewed the land under the

27. 21 N.D. 212, 129 N.W. 1029 (1911).

28. *Id.* at 216, 129 N.W. at 1031.

29. *Sathre v. Board of University and School Lands*, 65 N.D. 687, 704, 262 N.W. 60, 69 (1935); *Moses v. Baker*, 71 N.D. 140, 142, 299 N.W. 315, 316 (1941); *State v. Amerada Petroleum Corp.*, 78 N.D. 247, 262, 49 N.W.2d 14, 23 (1951); *State v. Oster*, 61 N.W.2d 276, 279 (N.D. 1953); *State v. Amerada Petroleum Corp.*, 71 N.W.2d 675, 685 (N.D. 1955); *Perrmann v. Knife River Coal Mining Co.*, 180 N.W.2d 146, 163 (N.D. 1970).

30. S. Con. Res. 4087 (1971).

31. *Id.*

32. N.D. GAME AND FISH DEPT., PRELIMINARY REPORT ON WILDLIFE, ENVIRONMENTAL AND RECREATIONAL ASPECTS OF UNIVERSITY AND SCHOOL LANDS (Jan., 1971) [Hereinafter N.D. GAME AND FISH DEPT.].

33. *Id.* at 7.

34. *Id.* at 12.

control of the Board of University and School Lands and classified the land into three categories:

(1) Acquire — To be retained and managed by the State Land Department, until such time as they are acquired by purchase by a public agency or political subdivision. These tracts have very high public values.

(2) Retain — To be retained and managed by the State Land Department, and then reevaluated by various state agencies or political subdivisions at a later date (5 or 10 years), to determine their future public values and future disposition, these tracts have a potential to be quite valuable to future generations. Could be sold any time before reevaluation to a public agency or political subdivision.

(3) Low Value — To be retained and managed by the State Land Department, until such time as they are sold. These tracts have low public values and little potential for same. Could be sold to anyone.³⁵

Using the above criteria, the report classified school and university land tracts as 28.5% in the "Acquire" category, 49.4% in the "Retain" category, and 22.1% in the "Low Value" category.³⁶ Even though the procedure employed by the Game and Fish Department was a cursory examination of School and University lands, the report brought into focus the fact that such lands may have a multiple use value and some tracts may be more valuable for wildlife, historical and recreational purposes than for agriculture. It took some time before the Board of University and School Lands began to wrestle with this problem.

Finally, in November of 1971, the board passed three motions.³⁷ The first motion provided that land which had a fair and good rating for wildlife and recreation would be withheld from sale.³⁸ The second directed that the Game and Fish Department be informed when a tract of land is put up for sale which has wildlife and recreational values.³⁹ The third adopted the following resolution:

Moratorium Request on Sale of University and School Lands

WHEREAS, the North Dakota Board of University and School Lands has approximately 800,000 acres of original

35. *Id.* at 13.

36. *Id.* at 2. The report indicates that inspections were made by Game and Fish department staff from vehicles and some tracts were merely valued from an aircraft.

37. Minutes of the Board of University and School Lands, Book K, at 288 [Hereinafter Minutes].

38. *Id.* at 295.

39. *Id.*

grant and acquired lands under its jurisdiction, in about 2,200 separate tracts; and

WHEREAS, many of these tracts are naturally wooded, contain valuable wetlands, provide potential reservoir sites, or in other ways have a high aesthetic or recreational value; and

WHEREAS, North Dakota has relatively few natural scenic areas in public ownership, and very few National Parks or Monuments; and

WHEREAS, these State school lands will be of greater economic value for recreation and tourism if retained in public ownership than if sold for agricultural purposes.

NOW, THEREFORE, BE IT RESOLVED that the North Dakota Natural Resources and Environmental Management Council, in its regular quarterly meeting held in Bismarck, North Dakota, on this 27th day of October, 1971, does hereby urge the Board of University and School Lands to place a minimum of five years moratorium on the sale of these State school lands delineated as having high recreational values in the "Preliminary Report on the Wildlife Environmental and Recreational Aspects of University and School Lands", prepared by the North Dakota Game and Fish Department.

BE IT FURTHER RESOLVED that all State resource agencies empowered by law to acquire lands make every effort to acquire these lands at appraised value from the Board of University and School Lands, as soon as their budgets will permit.⁴⁰

There appears to be some contradiction and confusion on the part of the board on the action taken. There were at the time pending applications for the sale of land before the board for their consideration. The thrust of their action was to proceed with the sale of land on which applications had been submitted. The motion passed at the January, 1972 meeting, cleared the air. It provided that after the January meeting the board would not open any more land for sale until after the legislature met and decided what to do.⁴¹

In 1973, the legislature did consider what should be done with university and school lands and adopted the following concurrent resolution:

A concurrent resolution directing the Board of University and School Lands to confer with appropriate agencies.

WHEREAS, the Game and Fish Department completed a study in which state lands held by the Board of University and

40. *Id.*

41. *Id.* at 309.

School Lands were classified into certain categories established by the Department; and

WHEREAS, the Board of University and School Lands adopted, on November 29, 1971, a resolution presented by the North Dakota Natural Resources and Environmental Management Council which placed a moratorium on the sale of state school lands classified as "acquire" or "retain" under the Game and Fish Department classification; and

WHEREAS, forbidding the sale of these state lands needlessly reduces income to the state school fund; and

WHEREAS, such land, when sold, will usually go on the local tax rolls, thus increasing revenues for local governmental operation, while such land is tax exempt under state ownership;

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE OF THE STATE OF NORTH DAKOTA, THE HOUSE OF REPRESENTATIVES CONCURRING THEREIN:

That the Board of University and School Lands is hereby urged to rescind the resolution adopted on November 29, 1971. That the Board of University and School Lands is hereby directed to withhold from sale only those lands which the board, acting with the advice of other agencies, determines to have exceptional scenic, archaeological, historic, recreational, conservational, or wildlife enhancement value; and

BE IT FURTHER RESOLVED, that copies of this resolution be forwarded by the Secretary of State to the members of the Board of University and School Lands and other State agencies.⁴²

The resolution threw the problem back into the lap of the Board of University and School Lands.

At a meeting held on June 16, 1973, the board adopted the following procedure:

1. That the Board of University and School Lands rescind its adoption of the resolution on the moratorium on the sale of University and School lands which said Board adopted at a meeting held November 29, 1971.
2. Accept applications for the purchase of Original Grant Lands in the manner prior to the moratorium.
3. Submit a list of tracts applied for to agencies represented on North Dakota Natural Resources and Environmental Management Council, prior to the meeting of the Board of University and School Lands with invitation to appear before the Board of University and School Lands, at its meeting, if there is objection to the sale of any tract or tracts listed.

42. S. Con. Res. 4008 (1973).

4. If objections are received, arrange for a hearing for the objectors, the applicant, the Land Department Fieldman and/or other interested parties.

5. If no objections are received, at the regular board meeting, present applications for the purchase of Original Grant Lands to the Board of University and School Lands for consideration and proceed with the applications in the regular manner.⁴³

This the board thought was an equitable procedure and again started to accept applications for the sale of land.

In following this procedure, a special meeting was held on November 16, 1973,⁴⁴ in which arguments of applicants as to their need for the land for which they had applied and arguments of state agencies as to the value of such land for purposes other than agriculture were heard. The needs of the applicants prevailed over the argument of the state agencies with the board, at its December 27, 1973 meeting, approving almost all of the contested land sales.⁴⁵ Part of this action can probably be attributed to the real lack of information which is available in regard to this land with only the cursory examination of the Game and Fish Department available to the board for consideration.⁴⁶

In January of 1974, the board received applications to purchase 251 tracts of land in 36 counties, covering 38,618.13 acres.⁴⁷ This was the largest request for state land received at any one time in the history of the State Land Department.⁴⁸ The board postponed consideration of these applications until July 1, 1974, so that further study could be made of land use.⁴⁹ The following month the board reconsidered the action it had taken at its January meeting. The board voted to proceed with the March land sales, as approved by the board, and to consider future land sales, applications for only those tracts which have had a detailed land use study completed by the State Land Department and which the Land Commissioner recommends for sale.⁵⁰

This resulted in the sale of 166 tracts in 31 counties, covering 25,488.81 acres.⁵¹ As to the tracts which were objected to by state agencies the same procedure was followed with the board holding a hearing to listen to the arguments for and against the sale of land.⁵² This time an opposite result was reached with the board refusing to sell land on

43. Minutes, *supra* note 37 at 419.

44. *Id.* at 459.

45. *Id.* at 473-477.

46. See N.D. GAME AND FISH DEPT., *supra* note 32, at 2.

47. Minutes, *supra* note 37 at 478.

48. Records of the State Land Department.

49. Minutes, *supra* note 37 at 483.

50. *Id.* at 485.

51. Records of the State Land Department.

52. Minutes, *supra* note 37 at 528.

the objection of a state agency.⁵³ Finally, the board at its meeting in August of 1974 established a policy of rejecting all protested land sales applications (public and private) pending legislative consideration during the 1975 session.⁵⁴ The problem confronting the board is not one which can easily be resolved; and it most certainly cannot be resolved without some legislative direction. Whatever is done must be accomplished "commensurate with the importance of the trust reposed in"⁵⁵ the Board of University and School Lands.

Presently, the constitutional and statutory provisions address themselves to either the sale⁵⁶ or lease⁵⁷ of such lands after appraisal and notice, at public auction and to the highest bidder. In reviewing these provisions, it is apparent that the main function of the Board of University and School Lands is to maximize income for the educational and charitable institutions, either through sale or lease. The problem arises when the board weights the income to be derived from sale versus leasing. In so doing the scale almost always tips toward sale because of the restrictive provisions pertaining to the leasing of this land.

Leases may only be made as to the surface "for pasturage and meadow purposes."⁵⁸ The only time the board may lease land for cultivation is when land which has been sold and placed under cultivation by a contract purchaser, the contract is subsequently canceled and the board resumes control over it.⁵⁹ With the limited purpose for which these lands may be leased, the board is placed in an untenable position in weighing the economics between selling and leasing these lands. A good example of this is the sale of land by the board from July 1, 1973, to June 30, 1974. During that time 301 tracts covering 45,392.41 acres were sold for a total purchase price of \$7,358,844.00.⁶⁰ This averaged out to \$161.11 per acre.⁶¹ Since the contracts were issued at an eight per cent interest and using a conservative eight per cent for the return on the down payment and return of principal in relation to the rentals which were received for this land in the past, it is eight and a half times more profitable to sell this land than to lease it.⁶²

It is obvious that these purchasers have the advantage of cultivating this virgin soil, even though it may be marginal for culti-

53. *Id.* at 542.

54. *Id.*

55. *Fuller v. Board of University and School Lands of The State of North Dakota*, 21 N.D. 212, 216, 129 N.W. 1029, 1031 (1939).

56. N.D. CONST. § 155, 158, 160; N.D. CENT. CODE §§ 15-06-22 to -27 (1971).

57. N.D. CONST. § 161; N.D. CENT. CODE §§ 15-04-06 to -11 (1971).

58. N.D. CONST. § 161; N.D. CENT. CODE § 15-04-01 (1971).

59. N.D. CENT. CODE §§ 15-04-01, -19 (1971).

60. Records of the State Land Department.

61. *Id.*

62. *Id.*

vation, with the hope of a bumper crop at high prices and paying the land off in a few years. Under the present structure, the board is placed in a position whereby it is difficult, if not impossible, to manage these lands. Its stewardship as to leasing these lands may be at an end.

V. WHAT CAN BE DONE?

One solution would be to sell all lands which are valuable for wildlife, scenic and recreational purposes to public agencies. The law provides that these lands may be acquired through purchase a market value by any entity in lieu of condemnation when there is a public or quasi-public purpose as to the use of this land.⁶³ But it is far from clear that this would be the ultimate answer.

Unquestionably, the land which the board supervises and controls has a use value for more than one use. If the land was not valuable for agriculture, the North Dakota farmer would not want to buy it. If the land did not have some value for wildlife, scenic and recreational purposes, public agencies would not raise their objections to its sale. The divestiture of the present title of the land into either government ownership, or private ownership, may not be in the best interest of all the people of this state; or, ultimately, in the best interest of the educational and charitable institutions for whom they are administered. When the land is sold, only the proceeds from the sale of the land remains. It may be prudent to retain ownership of at least some, if not all, of the remainder of this land so that there would be some diversification as to the assets of these trust funds. The ultimate goal would not be to sell the land at some future date to either a governmental agency, or a private individual. The ultimate goal would be to manage and administer these lands under a multiple use and leasing concept in order to maximize income for the educational and charitable institutions. To do this changes would have to be made under our present constitutional and statutory structure.

The State of Montana, which appears to have struggled with this problem and concept, has taken a step in the direction of liberalizing some of their provisions which pertain to the land granted to Montana by the United States. Previously, its constitution provided for a classification of these lands into classes valuable for grazing, timber, agriculture or city⁶⁴ while now it provides for a classification by that state's board of land commissioners in a manner provided by law.⁶⁵ Even prior to this change in Montana's Constitu-

63. N.D. CONST. § 158; N.D. CENT. CODE ch. 15-09 (1971).

64. MONT. CONST. art. XVII, § 1 (1889).

65. *Id.* art. XI, § 11.

tion, that state was inclined to a multiple use concept as are indicated by the amendment in 1969 of the statutory provision which establishes the powers and duties of the supervisory board to provide:

The board shall manage these lands under the multiple-use management concept defined as: The management of all the various resources of the state lands so that they are utilized in that combination best meeting the needs of the people and the beneficiaries of the trust, making the most judicious use of the land for some or all of those resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources, and harmonious and co-ordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being to the relative values of the various resources.⁶⁶

In 1974, Montana rewrote their provision pertaining to the classification of their state lands into classes which are principally valuable for grazing purposes, the growing of timber or watershed protection, the production of crops and "[l]ands which are principally valuable for use other than grazing, crop production, timber production or watershed protection."⁶⁷ In addition the amendment established a criteria for Montana to follow, adopting a true multiple use concept whereby a tract may have more than one potential use, when it provides:

The classification or reclassification shall be so made as to place state land in the class which best accomplishes the powers and duties of the state board of land commissioners as specified in section 81-103.

When state lands are classified or reclassified in accordance with these duties and responsibilities, special attention shall be paid to capability of the land to support an actual or proposed land use authorized by each classification. A capability inventory shall be made prior to changing the classification of state lands. Such inventory shall include, when appropriate to the classification, information on soils capability, vegetation, wildlife use, mineral characteristics, public use, aesthetic values, cultural values, surrounding land use and any other resource, zoning or planning information which is related to the classification. Should a parcel of state land in one class have other multiple use or resource values which are of such significance that they do not war-

66. MONT. REV. CODES ANN. § 81-103 (1974 Supp.) ; L. 1969, ch. 113, § 1.

67. MONT. REV. CODES ANN. § 81-302 (1974 Supp.) ; L. 1974, ch. 8, § 1.

rant classification for the value, the land shall, nevertheless, be managed in so far as is possible to maintain or enhance these multiple-use values.⁶⁸

Montana has adopted the concept and management of their state lands on a multiple use theory. Under this classification, Montana's state land may be classified as having a primary use and secondary use, or even a number of equal uses. However, a problem appears to exist in the area whereby lands may be classified and managed on a use for which no income is produced. For example, if a tract of land is classified as having an exclusive or primary use for wildlife or recreation, there are no provisions to manage that land to derive income for their trust funds. It is conceivable that by classifying such lands into and managing such lands on a non-income producing use Montana would be violating its trust responsibility under its grant from the United States. The assumption of such a risk is unnecessary when legislation could be enacted to provide for the leasing and the production of income from state lands for uses other than agriculture.

Montana received its grant under the same federal legislation as North Dakota.⁶⁹ The Enabling Act does address itself to the leasing of lands granted to the states by the United States, but merely provides that such lands may be leased as the legislatures provide subject to the limitations that mineral leases may be granted for such terms and upon such conditions which the legislatures of the respective states provide, that grazing and agricultural leases may be made for a term not to exceed ten years, and that hydroelectric power leases may be made for a term not to exceed fifty years.⁷⁰ Since these lands may be leased as prescribed by the legislature subject only to the limitations set out above, there are no inhibitions under the Enabling Act to leasing the lands for uses other than grazing and agriculture. It merely evolves to a policy question of the particular state as to whether or not to do so. Since it appears to be a questionable practice to adopt the multiple use and management concept without adequate provisions for the production of income on all uses for the trust funds, North Dakota, if it chooses to adopt a multiple use concept, should also make adequate provisions for leasing such lands and generating income on a multiple use concept.

68. MONT. REV. CODES ANN. § 81-302 (2) (1974 Supp.).

69. Enabling Act of 1889, ch. 180, 25 Stat. 676.

70. 52 Stat. 1198 and 47 Stat. 150, amending Enabling Act of 1889, ch. 180, § 11, 25 Stat. 676.

VI. NEEDED CHANGES IN NORTH DAKOTA LAW

North Dakota's very restrictive constitutional provision pertaining to the leasing of these lands provides:

The legislative assembly shall have authority to provide by law for the leasing of lands granted to the state for educational and charitable purposes; but no such law shall authorize the leasing of said lands for a longer period than five years. Said lands shall only be leased for pasturage and meadow purposes and at a public auction after notice as heretofore provided in case of sale; provided, that all of said school lands now under cultivation may be leased, at the discretion and under the control of the Board of University and School lands, for other than pasturage and meadow purposes until sold. All rents shall be paid in advance.

Provided, further, that coal lands may also be leased for agricultural cultivation upon such terms and conditions and for such a period, not exceeding five years, as the legislature may provide.⁷¹

Under this provision, leases cannot be made for any other purpose than for pasturage and meadow purposes, unless they fall within the exception, and for a term not to exceed five years while even the Enabling Act provides for a term of not to exceed ten years.⁷² This provision also inhibits an adoption by North Dakota of any type of multiple use and leasing concept. Therefore, it is suggested that this provision of the North Dakota constitution be amended to read as follows:

The legislative assembly shall have authority to provide by law for the leasing of lands granted to the state for educational and charitable purposes. Said lands may be leased for any purpose, or purposes, deemed advisable upon such terms and conditions and for such a period as the legislature may provide.⁷³

Through the adoption of this suggested constitutional amendment, the legislature would be vested with authority to enact a leasing policy which could encompass the management of these lands on a multiple use theory.

The North Dakota Legislature could take a page from the history books of Montana and enact legislation similar to that state,⁷⁴ directing the Board of University and School Lands to analyze and

71. N.D. CONST. § 161.

72. 52 Stat. 1198, amending Enabling Act of 1889, ch. 180, § 11, 25 Stat. 676.

73. Author's draft.

74. MONT. REV. CODES ANN. § 81-302 (1974 Supp.).

classify the remaining state lands. Such an analysis and classification could encompass all potential uses of these lands with direction to the board to determine priority between the uses and to manage these lands consistent with their potential uses. With such an analysis and classification, legislation could be enacted to authorize the leasing of these lands in order to achieve maximum utilization of them.

One benefit which could be achieved in the area of maximizing income to the trust funds is to authorize leases for agricultural cultivation on the remainder of these lands which are suitable for cultivation. The rental from agricultural cultivation leases could be based on a set fee per acre basis, or on a crop share basis, with the latter being far more potentially beneficial to the trust funds than the former. Presently, rental on a crop share basis is out of the question since the constitution provides that all rentals must be paid in advance.⁷⁵ Another benefit would be the possibility of a simultaneous leases on a particular tract which is potentially valuable for more than one use. A particular tract may be valuable for grazing and at the same time have value for wildlife purposes. One lease could be entered into with an individual to permit the use of the tract for grazing purposes and another lease could be entered into with an appropriate public agency to permit the use of the tract for wildlife purposes, thereby deriving income for the trust funds from both uses. Regarding tracts classified as primarily or exclusively valuable for aesthetics, the Board of University and School Lands could be authorized to execute a lease with either a public or private agency which would be interested in the preservation of that value or use.

The goal of managing these lands on a multiple use theory while still deriving income from a primary or exclusive use other than agriculture can be achieved. First, section 161 of the North Dakota Constitution would have to be amended to permit a more liberalized use and leasing of the land granted for educational and charitable purposes. Second, legislation should be enacted to authorize the Board of University and School Lands to analyze and classify the remaining state lands on a multiple use theory. Third, after the amendment to section 161 was accepted, legislation should be enacted to authorize the Board of University and School Lands to enter into leases for whatever use a tract of land may be valuable, including simultaneous leases on the same tract.

75. N.D. CONST. § 161.

VII. CONCLUSION

The resolution of the problem which presently exists with the remaining state lands granted by the United States to North Dakota for educational and charitable institutions is possible. Certainly all will not agree with the views expressed herein. Some will still advocate the sale of all state lands so that they will be placed on the tax rolls. Some will still advocate no sale of land and no changes in the present status of the law since the remaining state lands have a far greater value to future generations than can be expressed in dollars and cents. The views expressed herein are the author's views of how state lands granted to North Dakota by the United States can be managed on a multiple use theory, generating income for the various trust funds in a way consistent with the trust responsibility reposed in the Board of University and School Lands.

APPENDIX

This appendix presents state school land acreage broken down by county, acreage and number of tracts. The data was drawn from State Land Department records as of June 30, 1974.

County—Acres	No. of Tracts	County—Acres	No. of Tracts
Adams—17,122.32	109	McLean—22,487.54	157
Barnes—2,799.58	18	Mercer—15,089.94	102
Benson—11,083.48	101	Morton—18,286.01	121
Billings—31,241.47	200	Mountrail—32,511.05	218
Bottineau—3,394.15	22	Nelson—2,854.47	31
Bowman—29,433.32	189	Oliver—8,644.19	56
Burke—16,262.46	105	Pembina—None	
Burleigh—29,287.57	190	Pierce—14,485.01	98
Cass—40.00	1	Ramsey—2,216.50	23
Cavalier—1,154.49	11	Ransom—1,120.00	7
Dickey—3,983.77	26	Renville—1,911.00	12
Divide—21,741.97	140	Richland—513.68	4
Dunn—26,139.52	166	Rolette—8,153.35	58
Eddy—10,993.19	86	Sargent—1,128.79	8
Emmons—15,005.12	100	Sheridan—27,776.61	185
Foster—3,436.11	23	Sioux—23,538.42	156
Golden Valley—29,048.24	187	Slope—23,621.72	149
Grand Forks—2,233.77	14	Stark—6,463.61	41
Grant—34,119.94	218	Steele—None	
Griggs—1,741.24	13	Stutsman—15,191.38	102
Hettinger—9,925.69	64	Towner—8,254.94	74
Kidder—29,276.79	189	Traill—None	
LaMoure—1,605.00	10	Walsh—201.02	3
Logan—9,694.78	63	Ward—11,199.06	72
McHenry—22,470.32	146	Wells—5,255.39	41
McIntosh—6,720.01	48	Williams—39,528.99	258
McKenzie—64,127.12	408	TOTAL—724,514.11	4,823

